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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

MARY ELLEN UNDERWOOD, Adminis-
tratrix of the Estate of EMMETT G.
UNDERWOOD, Deceased,

Respondent,

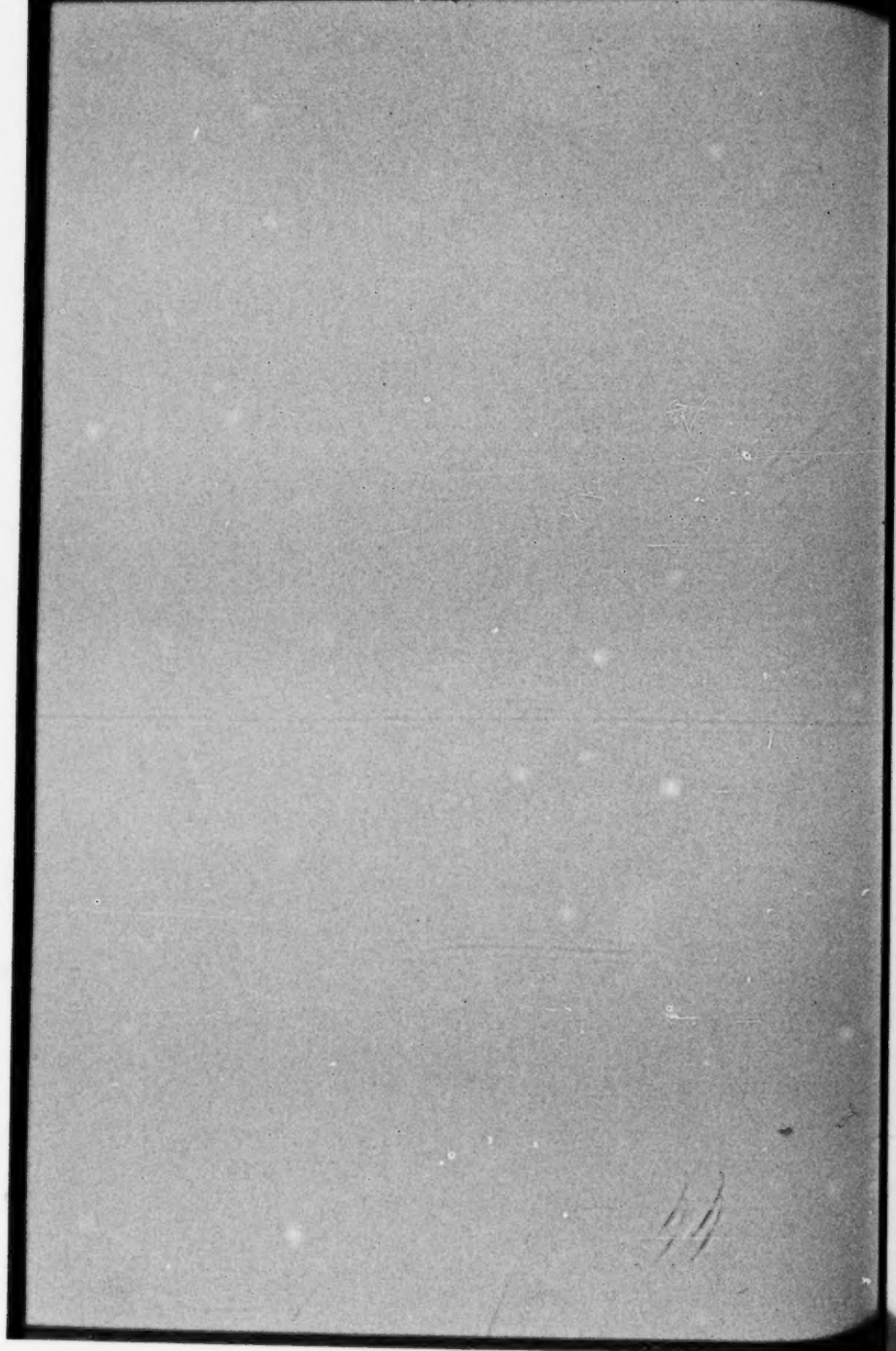
vs.

LOUISVILLE AND NASHVILLE RAIL-
ROAD COMPANY, a Corporation,
Petitioner.

No. **613**.....

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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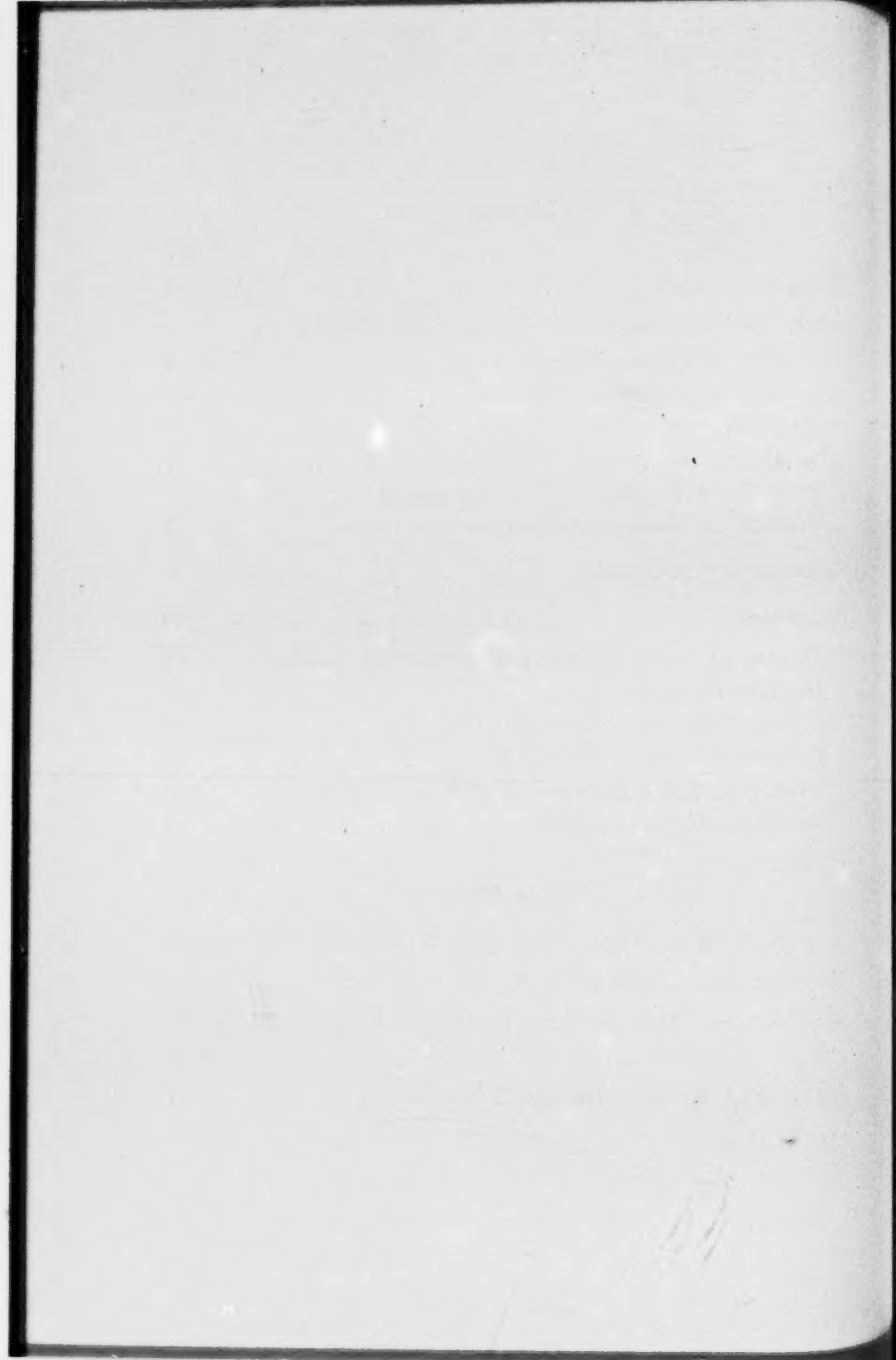


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FACTS AND ISSUES.

Although familiar with the yard and its tracks, switches, buildings, etc., defendant's engineer, Holmes, after the wrong switch was thrown, backed the cut of cars 420 feet, the length of a city block, along the wrong track and into the covered platform, and stopped only because he heard the crash of collision, and **not** because of any signal or of being on the wrong track.

During all that time, he and fireman Haines were **EACH RELYING ON THE OTHER** to see signals from decedent on the rear end of the cut, and neither of them saw dece-

dent or his signal lantern during the entire time, although the engineer continued to back the cut in violation of Rule 1011 expressly prohibiting the continued movement under such circumstances.

Petitioner contends that the court should rule four propositions **as matters of law** and not as facts for the jury, namely:

1. That under the evidence, **as a matter of law**, it was decedent and not Haines who threw the switch.

2. That throwing the wrong switch was negligence **as a matter of law**, notwithstanding the conditions of darkness, decedent's unfamiliarity with the yard and its tracks and switches, the conflicting instructions that had been given him, etc.

3. That in backing the cut a whole city block along the wrong track into collision with the covered platform while each was relying on the other to receive signal from decedent, and when neither of them saw decedent or his signal lantern, which was a violation of Rule 1011, the engineer and fireman were, **as a matter of law**, not negligent.

4. That the collision, which was what killed the decedent, resulted **as a matter of law** solely from the earlier negligence in throwing the wrong switch.

The trial court held that the case was for the jury, and the jury returned a verdict for the plaintiff. **Petitioner**, as defendant, filed a "Motion for judgment notwithstanding the verdict and, in the alternative, a motion for a new trial" (190). Later the defendant formally withdrew its motion for new trial and submitted only its motion for judgment notwithstanding the verdict (192), which the court overruled (193), and defendant appealed (194).

The Circuit Court of Appeals held that, even if decedent threw the wrong switch and in so doing was negligent,

nevertheless the question whether the later collision and death were caused by negligence in violating Rule 1011, by continuing the backing operation while neither the engineer nor the fireman saw decedent or his lantern, was a question of fact for the jury and could not be ruled as a matter of law (208).

Petitioner in its statement (petition, page 6, near bottom) concedes that the engine passed the decedent before the decedent reached the switch in question, and he therefore did not have the illumination of the headlight in throwing the switch. Nevertheless, petitioner later contends (petition, page 7, near bottom) that the same switch was brightly illuminated by the headlight while decedent was throwing the switches, which contention is again repeated on page 13 (middle of page). At page 14, however (near top), in considering the **engineer's** situation at the time, petitioner contends that it was very dark!

Respondent also considers petitioner's statement of facts deficient concerning the following facts:

The Plat and Distances (Defendant's Exhibit 1).

Defendant's witness Nottingham, its assistant division engineer, testified (169) that he personally checked the distances on the plat, Defendant's Exhibit 1 (185), and that it is correctly drawn to scale. It should be observed, however, that the plat is marked "scale one inch equals twenty feet," but that in reproducing the plat for the transcript it has been reduced to approximately one-half its original size so that the scale of the plat as printed is approximately **one inch equals forty feet**.

Many of the important distances are marked in feet on the plat, but several are not so marked, although they may be ascertained by measurement, using a scale of one inch as equal to forty feet. The following distances have been so ascertained from the plat:

Distance from south end of main-line track shown on plat to main-line switch entering drill track, 460 feet.

Distance from said main-line switch to No. 2 house track switch, 180 feet.

Distance from No. 2 house track switch to No. 1 house track switch, 100 feet.

Distance from said No. 1 switch to No. 3 switch entering pocket, 78 feet (marked on plat).

Length of one car, and length of tender, about 40 feet (104), equal to about 1 inch on printed plat.

Length of four cars and the tender, being distance from end of cut to rear of engine proper, about 200 feet.

Distance from rear car of cut when stopped, 10 feet north of No. 3 switch, to end of same car on covered platform after accident, 420 feet.

Distance of engineer south from No. 3 switch when stopped at time of accident, 220 feet.

Distance of engineer when stopped as above after accident, to northeast projection of platform, 30 to 34 feet.

Distance from No. 1 house track switch to steps at northwest corner of platform, 180 feet.

Distance from No. 2 house track switch to steps at northwest corner of platform, 80 feet.

Version of Fireman Haines.

Fireman Haines testified that he rode on the east side of the rear car of the cut until it was past No. 3 (pocket) switch, which he thought was No. 1 house track switch, and that the deceased, Underwood, was standing there west of the track and told Haines to stop, which was done on Haines' signal to the engineer, the rear (south) end of the car being stopped about ten feet north of the No. 3 switch; that the decedent, Underwood, threw the switch

and said to "back him up" (34), which Haines signaled the engineer to do, and that decedent Underwood then climbed up on the west side of that rear car, and the cars were backed pursuant to the signal, and that that was the last time that Haines saw decedent Underwood or his light until after the accident (34). Fireman Haines testified that he stood (34) there at that point opposite No. 3 switch or may have walked a little (34, 44); that when the cut started to back, pursuant to his signal, he was through with that operation and was not to receive any signal from decedent Underwood until after he had stopped and come down off the cars, and was not looking for any signal from the decedent, or watching in the direction where he thought decedent was (38, 43). He said that the signal to stop the cut when it reached the place where decedent was to spot it was to be given by decedent direct to the engineer and that he (fireman Haines) was not to receive it from the decedent and forward it to the engineer, and that he (fireman Haines) was not watching for any such signal or looking south to receive the same (43, 44). When the engine stopped after the accident it had passed Haines and was south of him (44).

Version of Engineer Holmes.

Engineer Holmes testified that decedent Underwood went forward on the northbound main line from the stopped engine and unlocked and threw the main-line switch entering the drill track, and then walked from there along the drill track to No. 2 house track, which he unlocked and threw, during which time the engine headlight illuminated said switches, and that when decedent threw said No. 2 switch, which allowed the cut to proceed along the drill track, the engine came between the view of the engineer, who was on the east side, and the decedent, who was on the west side of the track, and that that was the

last time that engineer Holmes saw the decedent or his lantern until after the accident (56). Engineer Holmes also testified that after receiving from fireman Haines the signal to back up into what he thought was No. 1 house track, he proceeded to back at a speed of about three miles per hour (64, 80), and that he was expecting to receive a signal to stop when the cars reached the place to be spotted on house track No. 1, but that he understood that he was to receive such signal from fireman Haines, who was out on the ground and who was to receive it from the decedent, and that he, engineer Holmes, was not expecting to receive any signal from the decedent and was not looking for any such signal, but was looking at fireman Haines out on the ground (66, 78, 94, 99, 101). He also testified that when he stopped the cut it was because he heard a crash, and not because he received a signal from anyone, as he had received none (59, 65, 91), and that when he stopped fireman Haines was on the ground near by, and he called him over and told him to go and look for decedent Underwood (81, 100).

In trying to make their scheduled trip engineer Holmes tried to "save as much time as possible" in switching cars (53).

He testified that it was his duty to know where the brakeman and fireman were at all times while switching (68, 69).

On the occasion in question he could stop the engine and cars in ten or twelve feet (74).

Testimony of Witness Martin.

Witness Martin testified that he is a locomotive engineer in the employ of defendant, L. & N. Railroad, and had been in its employ forty years. He testified that the L. & N. Railroad had a rule, No. 1011, in force at the time of the accident (115), which reads:

"Rule 1011: They must take into consideration the fact that the lives of the passengers and employes, as well as the property of the Company are intrusted to their care; and it is fully expected and required that they will not only attend to and obey all signals and instructions, but also that they will, on all occasions be vigilant and cautious themselves, not trusting alone to signals and rules for safety. If in switching the signals are lost to view, stop must be made until signals can be seen." (Emphasis supplied.)

He also testified that the portion of the rule requiring switching operations to stop when the signals could not be seen was a customary practice for members of railroad crews engaged in switching, and that under it the engineer in the present case should have stopped movement of the cut when he could not see decedent Underwood, if the signal was to be received from Underwood, or if the signal was to be received by the engineer from fireman Haines, and Haines was to receive it from Underwood, then, under the rule, fireman Haines should have stopped the movement when decedent Underwood could not be seen (123, 124).

Testimony of Witness Williams.

Witness Williams testified that he had been in the employ of defendant, L. & N. Railroad Company, and knew the customs and practices and was familiar with Rule 1011 above quoted (133), and that either the fireman or engineer should have known where decedent was, while the backing was continued (136, 141, 143, 145, 147, 148).

Rule No. 1011 Admitted by Defendant.

In response to a demand for admissions, there was furnished by defendant railroad a copy of the printed rules of

the transportation department, entitled "Safety Rules," which were in force at the time of the accident and which contained the above Rule No. 1011 (151, 157).

Version of Conductor Phillips.

Conductor Phillips testified that he had instructed decedent Underwood as to the method of doing the switching at Cullman, Alabama (173, 174, 175), and that he warned him not to ride on the east side of the cars going into house track No. 1, because of the clearance (173).

SUMMARY OF ARGUMENT.

I.

The evidence authorized the jury to find that negligence of the engineer was a proximate cause of the accident, and that negligence in throwing the wrong switch was, at most, contributory negligence, and not a defense under the Federal Employers' Liability Act.

L. & N. R. R. v. Wene, 202 F. 887 (7 C. C. A. 1913);
Union Pac. R. R. v. Hadley, 246 U. S. 330;
Rocco v. Lehigh Valley R. R., 288 U. S. 275.

II.

The law presumes that decedent was exercising reasonable care during the time that the cars were backing, since the evidence does not show what he did.

Stephenson v. Grand Trunk R. R., 110 F. (2d) 401
(7 C. C. A. 1940).

ARGUMENT.

Petitioner's brief, both in its statement and its argument, conveys the impression that the witnesses all agreed and that their testimony was consistent and their versions were in harmony with each other and with the undisputed physical facts, which, however, is far from being the situation as shown by the record in this case.

The distances between the various switches and other features of the locus in quo in several instances have already been stated earlier in the statement, but deserve further comment here.

The distance which the engineer backed the cut before stopping it when he says he heard a crash was 420 feet. This distance is made up of the following parts: 10 feet for the distance from switch No. 3, north to the rear end of the rear car where it stopped before backing, 93 feet for the distance from switch No. 3 to pocket switch No. 51, said distance being marked on the plat, 286 feet for the distance from said pocket switch No. 51 to the north edge of the covered platform, which distance is marked on the plat, and 31 feet for the length of the rear car which extended south of the covered platform after the accident, which distance is marked on the plat.

From the above distance it is also a mere matter of calculation that if the cut was backing at the speed of three miles per hour, as testified, it would require about 90 seconds for it to traverse said 420 feet, or, in other words, about one and one-half minutes.

The evidence also shows that the cars were about 40 feet long and that the tender was about the same length, so that the four cars and the tender together extended a distance of about 200 feet. Since the engineer sits at the rear of the engine, not far ahead of the front end of the

tender, we know that in this case the engineer was seated at a point a little more than 200 feet from the south or rear end of the cut of four cars attached to the tender. From this fact we also know by computation that when the engineer stopped the cut at the time of the accident he was then located with his head out of the cab at a point a little more than 200 feet north of the south end of the last car, which was then extending into and lodged in under the covered platform roof. From the plat it will be seen that the engineer, when he came to a stop, was only about 30 to 34 feet from the northwest corner of the platform shown on the plat. We also find, by deducting said distance of 200 feet of the engineer north of the last car, that the place where the engineer stopped and where he was looking out the cab was about 220 feet south of No. 3 switch, or, in other words, that the engineer had passed said switch No. 3 about 220 feet back, switch No. 3 being the point at which fireman Haines alighted from the car and thereafter remained on the ground somewhere thereabout.

Another physical fact about which there is no dispute is that the decedent Underwood, after the accident, was on top of the last car, pinned down on it by the roof of the covered platform, or, in other words, that at the time of the collision decedent Underwood was on top of the last car, even though engineer Holmes and fireman Haines testified that they had not seen him there. From the evidence we cannot, of course, be sure how long decedent Underwood had been on top of the car before the collision. We do know, however, that if he boarded said car at switch No. 3 and proceeded to climb up on top of it, as testified by fireman Haines, who claims he saw him do it, that decedent Underwood had a period of about one and one-half minutes in order to climb the short distance up on top of the car if the cut were backing at three miles

per hour. A minute, of course, is a long time in such matters. A man who tried could probably climb on top within three or four seconds, and, even at the rate of a leisurely climb, would probably not take more than 30 seconds to get fully on top. From all of which it may be inferred that decedent Underwood could have reached and been on top of the car and been riding there for a period of about a minute or more before the collision occurred.

The above discussion is on the hypothesis that engineer Holmes was backing the cars at about three miles per hour, as he testified. However, under all the evidence, the jury would be authorized to infer that Holmes was backing the cars at a much greater speed than he admitted, greater than fireman Haines or decedent Underwood expected, and excessive and dangerous. Several facts indicate that this may have occurred. The happening of the accident itself is one such fact, and was more likely to ensue if engineer Holmes backed at high speed. Another fact is the passing of engineer Holmes beyond fireman Haines on the ground before the collision occurred. The testimony of Haines and the physical facts indicate that the engine had probably passed fireman Haines a considerable distance, for no accountable reason, unless it was the unexpected speed of Holmes in backing. It evidently was not expected by Haines. It also would tend to account for the failure of Holmes and Haines to discover that the cars were being backed on the wrong track. The extensive damage to the bumping block, platform and shed certainly does not indicate moderate speed, either.

It is possible, of course, that decedent Underwood rode on the west side of the car in the beginning without immediately climbing on top, and intended to wait until the car had reached the vicinity of the cars already on the track, before completing his climb to the top to signal for a stop. It should also be remembered that the conductor, accord-

ing to his testimony, had warned the decedent not to ride on the **east** side of the cars there because of the clearance, and also not to ride on the top at the **east edge** of the car for the same reason. Decedent Underwood may have intended to delay finishing his climb to the top until the car had reached a point opposite the covered platform so that he could see exactly what the situation was and how close the platform roof was at the top of the car, and be governed thereby in finishing his climb to the top of the car.

On the above hypothesis, it could also be inferred that when the car with decedent Underwood thereon got down near the platform, he saw that it was going to run along the wrong side, that is, the east side instead of the west side of the platform, and that he then got up on top of the car to signal for a stop to prevent the collision. That would account for his failure to go up on top of the car in the beginning (if he did not), and account for his having gotten on top of the car before the collision occurred and perhaps only shortly before.

The combined versions given by fireman Haines and engineer Holmes indicates that there is something wrong with their testimony, even though the exact inaccuracy cannot be determined.

For example, fireman Haines was very indefinite as to what he did after he alighted from the car at No. 3 switch. He and engineer Holmes were very positive about many things, especially those which placed all the blame on decedent Underwood and could tend to absolve themselves. The physical undisputed facts show that engineer Holmes, when he came to a stop after the collision, was more than 200 feet south of No. 3 switch, and, therefore, was about 200 feet south of the place where fireman Haines describes himself as being located thereabout on the ground. Fireman Haines admitted that the engine had passed him before it stopped. Engineer Holmes insisted that he was

watching fireman Haines for a signal from him, which, if true, would mean that engineer Holmes would be looking north and away from the cut of cars instead of south in the direction of where decedent Underwood was supposed to be. Engineer Holmes, of course, says that when he came to a stop fireman Haines was there near by on the ground. If that were true, then fireman Haines had to walk the distance of about 200 feet in the time that it took the cut to reach the point of accident, as above stated. It would, of course, have been physically possible for fireman Haines to have walked that distance and been at that point, but any such theory would be contrary to his own testimony, nor is it likely that he would so hurriedly have walked that distance when he could have ridden on the cars.

Throwing Wrong Switch Not Necessarily Negligent.

Petitioner's brief assumes that if decedent Underwood was the person who threw the wrong switch, that he inevitably was guilty of contributory negligence. The trial judge also adopted the same view and so charged the jury. This decision of the matter, as one of law and not a question of fact for the jury, is at least debatable under all the evidence. Concededly, decedent Underwood was not familiar with the switches there at Cullman, which is shown by much evidence, including the fact that diagrams to explain the situation had been drawn for him by members of the crew, according to their testimony, and all of them had given instructions, more or less conflicting, as to what he was expected to do.

The various descriptions as testified by the witnesses certainly leave a doubt as to whether or not they were so clear and explicit as to make a failure to follow what the describers actually intended, constitute a wrong amounting to culpable negligence.

There is also the element of how light or dark it was. All the witnesses who testified thereon stated that it was a "clear night," but fireman Haines and engineer Holmes emphasized the existing darkness.

Petitioner assumes that the headlight illuminated switches No. 1 and No. 3 when decedent was there, but the evidence shows that the engine passed decedent when he was at switch No. 2, and so had passed No. 1 and No. 3 before decedent reached them.

Proximate Cause.

The versions of fireman Haines and engineer Holmes disclose a most remarkable situation existing while engineer Holmes was backing the cut into house track No. 1. Their versions show that it was the engineer's intention to continue to back until a signal stopped him, but that neither he nor Haines intended to receive or were looking for a stop signal from the rear of the cut, because fireman Haines was not looking for or intending to receive a stop signal at all, and engineer Holmes, while intending to stop on signal, was looking solely at fireman Haines and expecting and intending to receive the stop signal from Haines, who was not looking for or in the direction to receive such a signal. Evidently, according to their versions, the backing operation would have been continued until stopped by hitting something, irrespective of whether they were on the wrong track, as they were, or on the right track, which they were not.

The above situation was not caused by, and had no relation to, the episode of throwing the wrong switch. It did not depend on whether the backing was along the right track or the wrong track. Their intentions, as shown by their testimony, would result in the backing operation continuing until some collision stopped it. Haines was not looking for and would not receive a stop signal, and Holmes was looking only to Haines for such a signal.

From the above it would appear to be beyond debate that throwing the wrong switch not only was not the sole proximate cause of the collision, but, furthermore, that **it was not a proximate cause at all.** The collision was not caused by the throwing of the wrong switch, but by the understanding or misunderstanding and intentions of Haines and Holmes, which would inevitably result in a collision, regardless of which track was being used. The effect was merely to kill Underwood in a collision with the depot platform instead of killing or injuring him by collision with the standing cars at the south end of house track No. 1.

It should be observed that engineer Holmes **did not stop the backing movement on account of any signal which he received from anyone, or on account of the failure to receive some signal, or on account of the failure to see or know the whereabouts of decedent Underwood.** He stopped, according to his testimony, only because he knew that a collision had occurred, of which he heard the crash.

The evidence shows that engineer Holmes backed the cut more than 400 feet, a city block, and over a curved track past near-by objects which should clearly have indicated to him, if he had been exercising reasonable care, that he was backing along the wrong track. Fireman Haines, who claimed to be on the ground, testified that he did not observe that the backing was being done along the wrong track, although he could not have failed to notice it if he was exercising reasonable care.

It will be observed that house track No. 1 and its continuance north past switch No. 1 is a perfectly straight track without any curves or deviations. The plat, Defendant's Exhibit 1 (185), shows this clearly, and the photograph, Plaintiff's Exhibit 1 (179), showing the view looking south along house track No. 1 from a point north of switch No. 3, also shows this. The engineer, leaning out

the side of his cab and looking directly south as he should have been, could not have failed, if he had exercised reasonable care, to observe that he was not following the perfectly straight track south, with which he was perfectly familiar, but that the cars were turning off along the pocket track to the east. The failure of engineer Holmes to observe this fact may be explained by his testimony that he was not looking at the cars, but was looking at fireman Haines out on the ground some distance from the track; but this, even if it accounted for his failure to observe the fact, would convict him of negligence in not looking in the direction required by his duties.

Decedent Underwood was not hurt by the throwing of the wrong switch on any theory. At most, that would be merely an incident in a chain of later events which terminated with the collision and the fall of the shelter over the platform which crushed him and was the immediate cause of his injury and death. During that intervening time between the starting south of the cut and the final collision, the engineer Holmes and the fireman Haines owed Underwood a duty to exercise reasonable care for his safety, irrespective of how much or how little negligence Underwood had or had not been guilty of up at No. 3 switch, if, as a matter of fact, Underwood was actually up there, as testified by Haines. Merely because Underwood, through ignorance of the locale or darkness of the night or the confusion of explanations and instructions which had been given him, did throw switch No. 3 by mistake, and even if that constituted negligence, the engineer and fireman were not thereby authorized to kill him with impunity or exercise any less than the reasonable care which every human being owes to every other, and which, in particular, these railroad crew members owe each other.

Furthermore, the jury was entitled to draw inferences from the conclusively established facts, such as that de-

cedent Underwood was on top of the car, and if they believed the version of fireman Haines that Underwood climbed the ladder to go on top of the car back at No. 3 switch, could infer that decedent Underwood did reach and was on top of the car within a short time thereafter, with his lantern, and visible to either Haines or Holmes, if they had exercised the care to look, and would disclose that the cars were on the wrong track. The jury could even infer that decedent Underwood signaled for a stop with his lantern and did all that he could to stop the cut, but that neither engineer Holmes nor fireman Haines saw the signal because, as above stated, the engineer was looking at the fireman on the ground, and fireman Haines on the ground was not looking for and not intending to observe or receive any signal from the decedent. The evidence conclusively establishes that Underwood did get up on top of the car, even though it does not show exactly when that occurred. Although Underwood undoubtedly was there on top of the car, Holmes and Haines testified that they never saw him and their testimony indicates that they did not look, which explains their failure to see but convicts them of negligence.

For the above reasons, although the evidence is such as to authorize different inferences as to what actually did occur on the occasion in question, there is no theory sustained by the evidence under which negligence of decedent Underwood was the sole cause of his injury and death, either as a matter of law or as a permissible finding of fact by the jury. At most, on any theory, the negligence of decedent Underwood, if in fact he was negligent, was a contributing cause of the collision and injuries, and not the sole cause either as a matter of law or, in view of the evidence, a permissible finding of the jury. Under all the evidence, even if construed most favorably to the defendant instead of to the plaintiff as the law requires, the jury

was not authorized to find more than that decedent Underwood was contributorily negligent, which would not bar a recovery, but merely operate in mitigation of damages under the Federal Employers' Liability Act.

Safety Rule 1011 and Custom.

Defendant's Rule 1011 is perfectly clear and its purpose and intent are obvious. Under it, when cars are moved or in motion during a switching operation, the person charged with the duty of giving the signals must be within view of the engineer or whoever is to receive the signals, and when such person, or at night his lantern, passes out of view, the engineer is required to stop the movement. Not only was this an express and written rule of the defendant, but it was shown by the testimony to be the safety practice and custom of operation among railroad men, and engineer Holmes himself admitted the duty as described.

The evidence shows, however, that decedent Underwood was out of the view of both engineer Holmes and fireman Haines, during all the time that the cars were being backed a distance of a city block, continued even after Holmes passed Haines on the ground. It was a clear violation of the rule and custom under the existing conditions. This constituted negligence which on any theory was a proximate cause of the accident.

Care of Decedent Presumed.

What decedent did during the time that the car backed from No. 3 switch to where he was fatally injured is not shown by the evidence. Under the well-settled rule it must be **presumed** that he exercised reasonable care.

Stephenson v. Grand Trunk R. R., 110 F. (2d) 401
(7 C. C. A. 1940).

Contributory Negligence No Defense.

This case cannot be distinguished from the case of

L. & N. R. R. v. Wene, 202 F. 887 (7 C. C. A. 1913).

In that case a switch was left open through negligence of the decedent. A train ran through the open switch, resulting in a collision and decedent's death. The Court held that, since there was evidence that the engineer of the train could, by exercise of reasonable care, have discovered the open switch and stopped in time to avert the collision, the negligence of the decedent was merely a contributory cause of his death, if the jury so found, and would not bar recovery under the Federal Employers' Liability Act, under which contributory negligence is not a defense.

In the present case it was at least a jury question whether engineer Holmes could, by the exercise of reasonable care, have discovered that the wrong switch was thrown in time to stop before the collision a city block farther along. At most, the situation presents contributory negligence as a fact question, and would be no defense.

If the jury could find the decedent negligent in throwing the wrong switch in the darkness and unfamiliar surroundings, the jury could certainly find that Holmes was negligent in not discovering the error in the same darkness and the, to him, familiar surroundings while moving a city block.

The negligence of Holmes was later in time, longer in duration, and the **immediate** cause of the collision. Earlier negligence in throwing the switch could be no more, at most, than contributory negligence in producing the long-later collision.

Petitioner's Propositions.

I.

The contentions of petitioner under its point I, concerning the inadmissibility of conjectural and speculative constructions of the evidence and the general requirements of proof beyond a mere scintilla, require no discussion since they involve general statements of procedural policy and practice inapplicable in this case in view of the direct and substantial evidence heretofore discussed.

II.

Petitioner here contends that where one has the primary duty of controlling certain acts and is negligent therein, he cannot recover, although showing that others who had no duty in regard to such acts, by doing something outside their line of duty, might have prevented him from causing injury to himself.

We have no reason to dispute the stated contention of law or to discuss the cases cited in support thereof. The mere statement as formulated by petitioner discloses the complete inapplicability of such a legal proposition to the facts in this case.

The proposition as asserted by petitioner is expressly made dependent upon three, among other, elements, namely, (1) that others who had **no duty** in regard to such acts, (2) by doing something **outside** their line of duty, (3) might have prevented the person from **causing injury to himself**.

None of said three elements are made applicable by the evidence in this case construed on any theory. They would, no doubt, be applicable if decedent Underwood threw the switch in such a manner as to cause himself immediate injuries without the intervention of any subsequent causes or conduct of others, which, of course, is wholly different from the facts in this case. The contention

of petitioner proceeds on the theory that nothing whatever happened after the switch was thrown except the injury to Underwood, and that it was an immediate and contemporaneous result of the throwing of the switch alone. But, as heretofore stated, Underwood was not hurt by the throwing of the switch. He was not even hurt by the backing of the cut. He was hurt by the collision with the depot. In carrying on the backing operation, the engineer was not absolved from the duty of the exercise of care merely because the wrong switch had been thrown by some one. The engineer and the fireman during all the time that the cut was backed the distance of a city block were charged with all the duty of care that they ever were charged with in performing such an operation, and were not doing something "outside of their line of duty," but strictly a part of their duties. As to the third element above involving the conception of "preventing him from causing injury to himself," the evidence conclusively shows that the events culminating in the injury were caused in very large part or even wholly by the negligence and misconduct of engineer Holmes, and on **one** construction of the evidence authorized by the testimony as heretofore discussed, the throwing of the wrong switch would even be a wholly immaterial circumstance, not in any real sense a cause of the collision, but merely an incident which affected the situation only by allowing the collision to occur at one place instead of another, when the collision was inevitable at one or the other place because of the negligence of the engineer, or of the engineer and the fireman together.

III and IV.

Petitioner refers to the decedent being on top of the car and implies, at least, that this was improper or negligent as a matter of law. It is a matter of common knowledge that that conduct is not only common, but necessary. In fact, the evidence in this case demonstrates its neces-

sity. On the southbound trip a single car had been put off at Cullman on the same track, and since on that occasion the car was north of the engine instead of south of it, the tracks being located as they are at Cullman necessitated the practice of starting the car in motion towards house track No. 1 and then disconnecting the engine and running it off onto the drill track, and then throwing the switch again to align with house track No. 1 and permitting the momentum of the disconnected car to carry it past the switch and along house track No. 1 to the place where it was to be located, at which point it was stopped by the decedent Underwood, who was on top of it, setting the brake of the car. That not only was done pursuant to instructions, but was the only way under the circumstances that it could be done, and was and is a customary practice.

So far as the fact of Underwood being on top of the car at the time of the accident is concerned, he might have been just as likely to be injured whether he was on top of the car or on the side of the car or on the car at all. The injury was caused by the collision with the depot, and it is a matter of pure speculation as to how much or how little injury he would have sustained if he were riding some place else on the car instead of the place where he was.

Petitioner's point III is that decedent Underwood assumed the risk and should be denied a recovery.

This contention proceeds on the same assumption heretofore discussed: that the sole and only and immediate cause of decedent Underwood's injuries and death was the throwing of the wrong switch. As to this, it should be sufficient to point out without further argument than has already been expended on the relevant facts: (1) that if Underwood threw the switch, the question as to whether or not it was an act of the assumable-risk character was a question of fact and not one of law; (2) that the throw-

ing of the switch was not the cause of the collision and injuries, as a matter of law, but, at most, it was a fact question for the jury as to whether it was a proximate cause at all, and, if a proximate cause, whether it was the sole cause; and (3) that the evidence, construed most favorably to the plaintiff, does not authorize the conclusion, as a matter of law, that the risk was an ordinary one necessarily incident to the employment, or that it was an extraordinary risk of which Underwood knew and which he appreciated.

It is difficult even to reason upon the theory of assumption of risk as applied to the peculiar facts in this case on any hypothesis. Certainly no case cited by petitioner lends any plausibility to the contention that any construction of the evidence would authorize a determination of assumption of risk as a matter of law.

The petitioner fared unusually well in the court below—a fact evidently recognized by petitioner, since it does not want a new trial, and withdrew its motion therefor (192).

Respondent submits that the writ of certiorari should be denied, and prays that the Court so order.

Respectfully,

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